

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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UNITED STATES OF AMERICA
and
STATE OF DELAWARE,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS &
COMPANY, INC., and CIBA SPECIALTY
CHEMICALS CORPORATION

Defendants.
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Civil Action No.

COMPLAINT

The United States of America, by authority of the Attorney General, and at the request of the United States Department of the Interior, Fish and Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration ("NOAA"), an agency of the Department of Commerce, and the State of Delaware, on behalf of the Delaware Department of Natural Resources and Environmental Control ("DNREC"), allege as follows:

NATURE OF ACTION

1. This is a civil claim for natural resource damages brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601 *et seq.* and the Delaware Hazardous Substance Cleanup Act ("HSCA"), 7 Del. C. Chapter 91 with respect to the release of hazardous substances from the DuPont-Newport Superfund Site in Newport, Delaware (the "Site"), and the resulting injury to natural resources.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607(a) and 9613(b).
3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) and 42 U.S.C. § 9613(b).

PLAINTIFFS

4. Plaintiffs are trustees for natural resources injured as a result of releases of hazardous substances pursuant to Section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A).
5. The President has designated the Secretaries of the Interior and Commerce as trustees for various natural resources. *See* Exec. Order No. 12,580, as amended by Exec. Order No. 12,077, 61 Fed. Reg. 45871 (Aug. 28, 1996); 40 C.F.R. § 300.600(b)(2). Federal trusteeship for the Site includes, but is not limited to, the following natural resources and their supporting ecosystems: threatened and endangered species, migratory birds, certain anadromous fish and certain federally managed water resources.
6. DNREC is the designated trustee for natural resources which include, but are not limited to, the following natural resources and their supporting ecosystems: land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Delaware.

DEFENDANTS

7. Defendant E.I. du Pont de Nemours & Company, Inc. ("DuPont") is a corporation incorporated under the laws of the State of Delaware, with its principal place of business at 1007 Market Street, Wilmington, Delaware 19898.
8. Defendant Ciba Specialty Chemicals Corporation ("Ciba") is a corporation incorporated

under the laws of the State of Delaware, with its principal place of business at 560 White Plains Road, Tarrytown, New York 10591.

GENERAL ALLEGATIONS

A. The Site

9. The DuPont-Newport Superfund Site consists of approximately 120 acres in Newport, Delaware and unincorporated New Castle, Delaware at James and Water Streets, near the interchange of I-95 and I-495 and Delaware State Route 141.
10. For the past 100 years, the Site has been used in various chemical manufacturing operations.
11. The Site is the location of a paint pigment plant (the Newport facility), a former chromium dioxide plant (the Holly Run facility), and two inactive industrial landfills (the north and south landfills).
12. In the late 1970s, DuPont built a second facility at the Site in order to expand its chromium dioxide production (the "Holly Run facility").
13. In approximately 1984, DuPont sold the Newport facility to Ciba. Since the sale, Ciba has continued to produce QA pigment at the Newport facility.
14. The Site is also the location of two inactive industrial landfills (referred to as the north and south landfills), which have been (with the exception of a portion of the south landfill) owned and operated by DuPont since 1929. From 1902 to 1974, the north landfill was used by DuPont (and Krebs, its predecessor) to dispose of wastes from its manufacturing operations. From 1902 until 1953, the south landfill was used by DuPont (and Krebs, its predecessor) to dispose of large quantities of Lithopone wastes.

15. In approximately 2000, DuPont closed the Holly Run facility.
16. As a result of the manufacturing operations described above, the Site became heavily contaminated with various hazardous substances, including heavy metals (particularly arsenic, barium, cadmium, lead, and zinc) and volatile organic compounds (such as tetrachloroethane and trichloroethane).

B. Site Ownership

17. Krebs owned and operated the Site from 1902 until 1929.
18. In 1929, DuPont purchased the Site. DuPont has owned and operated some or all of the Site from 1929 through the present.
19. In approximately 1984, DuPont sold a portion of the Site (the Newport facility) to Ciba-Geigy, Ciba's corporate predecessor.
20. In 1996, Ciba-Geigy's specialty chemicals business (which included the Newport facility) was spun-off and became Ciba Specialty Chemicals Corporation.
21. As part of the spin-off, Ciba acquired title to that portion of the Site containing the Newport facility.
22. The Site is currently owned by DuPont and Ciba (with the exception of a portion of the south landfill).

C. Response Actions

23. In the late 1970s and early 1980s, the Delaware Department of Natural Resources and Environmental Control ("DNREC") and DuPont began sampling ground water at the Site. The results indicated that the ground water was contaminated with elevated levels of heavy metals (particularly barium, cadmium, and zinc) and volatile organic compounds (primarily

tetrachloroethane and trichloroethane).

24. During the mid-1980s, DNREC and EPA gathered information to determine whether the Site should be listed on the National Priorities List ("NPL") and in February 1990, the Site was listed on the NPL.

25. On August 22, 1988, EPA and DuPont entered into an Administrative Order on Consent ("AOC") to conduct a remedial investigation and feasibility study ("RI/FS") at the Site.

26. EPA issued the record of decision ("ROD") for the Site on August 26, 1993.

27. Following issuance of the ROD, EPA issued an Unilateral Administrative Order to DuPont and Ciba, which required them to perform the Remedial Design/Remedial Action ("RD/RA") described in the ROD. The RD/RA initially included excavating contaminated soils; capping the north landfill; restoring wetlands; recovering and treating ground water; excavating and consolidating contaminated soils, stabilizing *in-situ* soil, and capping of the south landfill; dredging and monitoring the Christina River; installing a groundwater barrier wall along the north bank of the Christina River; and paving sections within the contaminated plant areas.

28. The north and south landfills are adjacent to wetland areas known as the North and South Wetlands. Surface migration via runoff and groundwater migration from the north and south landfills contaminated soils, surface waters, and sediments within sections of the North and South Wetlands, and resulted in contamination to trust resources and their supporting ecosystems.

29. Assessment activities conducted by the Trustees concluded, *inter alia*, that post-remediation concentrations of hazardous substances such as cadmium, lead, and zinc remain in the North and South Wetland sediments, and continue to cause injuries to federal and state trust

resources such as benthic organisms, fish, birds.

30. Under Section 107 of CERCLA, 42 U.S.C. § 9607, and 43 C.F.R. Part 11, the Secretaries of the Interior and Commerce, and the Secretary of DNREC are entitled to recover damages for injury to natural resources, including (1) the cost to restore, replace, or acquire the equivalent of such natural resources; (2) the compensable value of lost services resulting from the injury to resources; and (3) the reasonable cost of assessing injury to the natural resources and the resulting damages.

CERCLA LIABILITY

31. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected

by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(C)
(S)

damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; . . .

32. The Site, including its wetlands, surface and sub-surface soils, and water, is a "facility," within the meaning of Sections 101(9) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(9) and 9607(a).

33. The substances contaminating natural resources at the Site are "hazardous substances," within the meaning of Sections 101(14), 104(a), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14), 9604(a), and 9607(a).

34. There was a "release" or "threatened release" of hazardous substances into the environment at and from the Site, within the meaning of Sections 101(8), 101(14), 101(22), 104(a), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(8), 9601(14), 9601(22), 9604(a), and 9607(a).

35. Hazardous substances were "disposed" of at the Site, within the meaning of Sections 101(14), 101(29) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(29) and 9607(a).

36. DuPont owned and operated the Site within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A) from 1929 until the present. DuPont sold the Newport facility to Ciba in 1984, but continues to retain ownership of other portions of the Site.

37. DuPont is a "person," within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
38. DuPont is the successor-in-interest to Krebs, and therefore succeeds to Krebs' liability under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as the owner and operator of the Site at a time when hazardous substances were disposed of therein.
39. DuPont is also liable under Section 107(a)(2), as the owner and operator of the Site at the time hazardous substances were disposed of thereon.
40. DuPont is further liable under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as a current owner and operator of portions of the Site.
41. Ciba is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
42. Ciba is a current owner and operator of portions of the Site.
43. Ciba and its predecessors have been owners and operators of portions of the Site since approximately 1984.
44. Ciba is liable under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as the current owner and operator of portions of the Site.
45. The release of hazardous substances from the facilities owned and operated by DuPont and Ciba caused injury to, destruction of, and loss of natural resources at the Site, within the meaning of Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C).
46. The United States has incurred and continues to incur costs related to the assessment of the loss of natural resources resulting from the release of hazardous substances at the Site.
47. Pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607(a), Defendants DuPont and Ciba

are jointly and severally liable to Plaintiffs the United States and the State of Delaware for damages for injury to, destruction of, and loss of natural resources and services resulting from the release of hazardous substances at or from the Site, including the loss of use and costs of restoration, replacement, or acquisition of equivalent resources and for the costs of assessing such injury and damages.

HSCA LIABILITY

48. Seven Del. C. Section 9105(a) provides as follows:

(a) The following persons are liable with respect to a facility from which there is or has been a release or imminent threat of release, except as provided in subsection (c) of this section:

- (1) Any person who owned or operated the facility at any time.
- (2) Any person who owned or possessed a hazardous substance and who by contract, agreement or otherwise arranged for disposal or treatment of a hazardous substance at the facility.
- (3) Any person who arranged with a transporter for transport, disposal or treatment of a hazardous substance to the facility.
- (4) Any person who generated, disposed of or treated a hazardous substance at the facility.
- (5) Any person who accepted any hazardous substance for transport to the facility, when the facility was selected by the transporter.
- (6) Any person who is responsible in any other manner for a release or imminent threat of release.

49. Seven Del. C. Section 9105(b) provides in pertinent part as follows:

(b) Each person who is liable under this section is strictly liable, jointly and severally, for all costs associated with a release from a facility and for all natural resource damages resulting from the release. The Secretary may recover all costs and damages from all responsible parties.

50. The Site, including its wetlands, surface and subsurface soils, and water, is a "facility," within the meaning of 7 Del. C. Section 9103(9).

51. The substances contaminating natural resources at the Site are "hazardous substances," within the meaning of 7 Del. C. Section 9103(11).

52. There was a "release" or "imminent threat of release" of hazardous substances into the environment at and from the Site, within the meaning of 7 Del. C. Sections 9103(20) and (12), respectively.

53. Hazardous substances released at the Site constituted "disposal" within the meaning of 7 Del. C. Section 9103(7).

54. DuPont was an "owner or operator" of portions of the Site within the meaning of 7 Del. C. Section 9103(15) from 1929 until the present. DuPont sold the Newport facility to Ciba in 1984.

55. DuPont is a "person," within the meaning of 7 Del. C. Section 9103(16).

56. DuPont is the successor-in-interest to Krebs, and therefore succeeds to Krebs' liability under 7 Del. C. Section 9105(a)(1) as the owner and operator of the Site at a time when hazardous substances were disposed of therein.

57. DuPont is also liable under 7 Del. C. Section 9105(a)(1) as the former owner and operator of portions of the Site.

58. DuPont is further liable under 7 Del. C. Section 9105(a)(1) as a current owner and operator of portions of the Site.
59. Ciba is a "person" within the meaning of 7 Del. C. Section 9103(16).
60. Ciba is a current owner and operator of portions of the Site.
61. Ciba and its predecessors have been owners and operators of portions of the Site since approximately 1984.
62. Ciba is liable under 7 Del. C. Section 9105(a)(1), as the current owner and operator of portions of the Site.
63. The release of hazardous substances from the facilities owned and operated by DuPont and Ciba caused natural resource damages at the Site, within the meaning of 7 Del. C. Section 9105(b).
64. The State of Delaware has incurred and continues to incur costs related to the assessment of the loss of natural resources resulting from the release of hazardous substances at the Site.
65. Pursuant to 7 Del. C. Section 9105(b), Defendants DuPont and Ciba are jointly and severally liable to Plaintiff the State of Delaware for all natural resource damages resulting from the release, including damages for injury to, destruction of, and loss of natural resources and services, the loss of use and costs of restoration, replacement, or acquisition of equivalent resources, and for the costs of assessing such injury and damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Enter a judgment against Defendants E.I. du Pont de Nemours & Company, Inc. and Ciba Specialty Chemicals Corporation jointly and severally for liability to the United States

and the State of Delaware pursuant to CERCLA Section 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), for all damages for injury to, destruction of, and loss of natural resources at the Site including the unreimbursed past, present, and future costs of assessing such damages, the cost of restoring, replacing, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial;

(2) Enter a judgment against Defendants E.I. du Pont de Nemours & Company, Inc. and Ciba Specialty Chemicals Corporation jointly and severally for liability to the State of Delaware pursuant to 7 Del. C. Section 9105(b), for all damages for injury to, destruction of, and loss of natural resources at the Site including the unreimbursed past, present, and future costs of assessing such damages, the cost of restoring, replacing, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial;

(3) Enter a judgment against DuPont and Ciba in favor of the United States and the State of Delaware for all costs of this action, including attorney's fees; and

(4) Award the United States and the State of Delaware such other and further relief as this Court may deem appropriate.

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division

W. BENJAMIN FISHEROW
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

RACHEL JACOBSON
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0494 (PHONE)
(202) 514-0097 (FAX)

COLM F. CONNOLLY
United States Attorney
District of Delaware

DOUGLAS E. McCANN
Assistant United States Attorney
Delaware Bar ID No. 3852
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, Delaware 19899-2046

Attorneys for the United States

OF COUNSEL:

Sharon Shutler, NOAA
Mark Barash, DOI

ROBERT S. KUEHL
Deputy Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801

Attorney for the State of Delaware